Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD H. KIMMEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF, PER RULE 22.6, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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12pp

QUESTIONS PRESENTED

[I] Whether a jury instruction directing the trial jury to infer that the defendant ordinarily intends the natural and probable consequences of his knowing acts and that the accused intended all the consequences of such acts are prohibited under the decisions of the Court in *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana*, 442 U.S. 510 (1979)?

[II] Whether the current *split-in-Circuits* as to the interpretation of *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) merits the granting of this Petition and the vacation of the conviction below?

[III] Whether *Connecticut v. Johnson*, 460 U.S. 73 (1983) really means that an instruction such as given in this case can be treated as harmless error?

[IV] Whether the trial court's declination to answer the only real question in the case violates the ruling in *Bollenbach v. United States*, 326 U.S. 607 (1946)?

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In accordance with Rule 22.6, Rules of the United States Supreme Court this supplement to the now-pending Petition for Certiorari is being filed.

The Petition was docketed on January 17, 1986 (See App. 1, *infra*).

The government declined to respond and the Court, on February 13, 1986 directed that the government respond (See App. 2, *infra*).

The Solicitor General, by written request, has moved that the government be given to and including April 13, 1986 within which to file the government's response to this Petition for Certiorari (See App. 3, *infra*).

The above documents are appended to this Supplemental Brief as indicated by the appendix numbers.

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ARGUMENT:

[I] Whether a jury instruction directing the trial jury to infer that the defendant ordinarily intends the natural and probable consequences of his knowing acts and that the accused intended all the consequences of such acts are

prohibited under the decisions of the Court in *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana*, 442 U.S. 510 (1979)? 2

[II] Whether the current *split-in-Circuits* as to the interpretation of *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) merits the granting of this Petition and the vacation of the conviction below? 2

[III] Whether *Connecticut v. Johnson*, 460 U.S. 73 (1983) really means that an instruction such as given in this case can be treated as harmless error? 2

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I.

REASONS FOR GRANTING THE WRIT

[I] Whether a jury instruction directing the trial jury to infer that the defendant ordinarily intends the natural and probable consequences of his knowing acts and that the accused intended all the consequences of such acts are prohibited under the decisions of the Court in *Francis v. Franklin,* ____ U.S. ____, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana,* 442 U.S. 510 (1979)?

[II] Whether the current *split-in-Circuits* as to the interpretation of *Francis v. Franklin,* ____ U.S. ____, 105 S.Ct. 1965 (1985) merits the granting of this Petition and the vacation of the conviction below?

[III] Whether *Connecticut v. Johnson,* 460 U.S. 73 (1983) really means that an instruction such as given in this case can be treated as harmless error?

Subsequent to the filing of our Petition on January 17, 1986, we have located two (2) additional decisions which further exemplify the current split-in-Circuits in connection with the proper evaluation of both mandatory and permissive "intent" instructions. Accordingly, this short supplemental brief is submitted for additional consideration by the Court.

In *Flowers v. Blackburn,* 779 F.2d 1115 (CA 5, 1986), the Court granted §2254 relief and directed that *Flowers* be granted a new trial based upon jury instructions that violated due process.[1] In *Flowers* the Court reviewed the

[1] While granting §2254 relief the panel noted that the Supreme Court has not resolved whether the harmless error doctrine is applicable to a *Sandstrom* error, 779 F.2d at 1123, n. 9.

suggested analytical approach in connection with burden-shifting instructions (779 F.2d at 1120). The Court, found that PERMISSIVE INFERENCES violate the Due Process Clause . . .

> "only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury," (779 F.2d at 1120).

On the other hand, the *Flowers* panel stated:

> "mandatory presumption violate the Due Process Clause 'if they relieve the State of the burden of persuasion on an element of an offense,' " (779 F.2d at 1120).[2, 3]

The *Flowers* case continued with the following statement from an earlier Fifth Circuit decision:

> "The [intent-imputing] instruction may not have been read by any juror as affecting the requirement that they find [Flowers] guilty of lethal purpose. On the other hand, the jurors may have accepted the literal meaning of the instruction as stated above. The fact that a reasonable juror could have done so means that we must discount the possibility that the jurors actually did proceed as the trial court intended. *See Sandstrom.* We are left with 'a level of uncertainty and unreliability [in] the fact-finding process that cannot be tolerated in a capital case.' *Beck v. Alabama,*

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[2] Citations have been omitted from the texted quotations for the sake of brevity. It should be noted that the Court's decision in *Francis v. Franklin,* ____ U.S. ____, 105 S.Ct. 1965 (1985) is cited with approval at pp. 1119, 1120 and 1123 of *Flowers.*

[3] Kimmel, as petitioner herein, points out that the Court below in his case found that the offending instruction allowed only for a *permissive inference;* but the Court declined to ascertain whether UNDER THE FACTS OF THE CASE the permissive inference violated the Due Process Clause (777 F.2d at 292, 293).

> 447 U.S. 625, 643 [100 S.Ct. 2382, 2392, 65 L.Ed.2d 392] (1980). 694 F.2d at 78."[4]

In *Lakes v. Ford*, 779 F.2d 1578 (CA 11, 1986) the Court again granted §2254 relief following a murder conviction. The predicate for the granting of relief was the giving of the following instruction:

> "[T]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, and such person is presumed to intend the natural and probable consequences of his acts, but either of these presumptions may be rebutted." (779 F.2d 1580).

The state argued in *Lakes* that an immediate subsequent paragraph in the jury instructions shielded the earlier instruction from constitutional challenge. The next paragraph in *Lakes* jury instructions read:

> "Such person, however, would not be presumed to act with criminal intention, but you, the jury, may find such intention upon consideration of the words, the conduct, the demeanor, the motive and all other circumstances connected with the act for which the accused is on trial, it being your duty to carefully evaluate all of the relevant circumstances in that

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[4] This Fifth Circuit Statement is from *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (CA 5, 1982), modified, 697 F.2d 699 (CA 5, 1983).

Petitioner discerns the Court's vigil in connection with the fact-finding process in capital cases . . . but petitioner would point out that if there be a constitutional violation it matters not whether the petitioner looses his [or her] freedom for a substantial number of years or looses his [or her] life. In many instances the result has a tendency . . . to be the same.

In the instant case the petitioner, now serving a six (6) year sentence has lost his business, his home and his family. Thus the collateral consequences of his conviction and incarceration are not totally remote from that of a capital case.

regard, the question of intent resting finally with you," (779 F.2d at 1580).[5]

The *Lakes* panel found that the following language:

"it being your duty to carefully evaluate all of the relevant circumstances in that regard, the question of intent resting finally with you," (779 F.2d 1581).

. . . did not save the instruction(s) from constitutional challenge.

The Court held:

"But that distinction is not enough to cure the constitutional error in the mandatory presumption of intent. Given the construction we have found a reasonable juror might give the mandatory rebuttal presumption of intent, the assertedly curative language on criminal intent only contradicts the mandatory presumption without explaining its import and applicability. Further, the added language that we have rejected to explain to the jury that they should determine appellant's intent from the evidence alone, and

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[5] The petitioner at bar, Kimmel, points out that the challenged instruction as per his original petition and this supplemental brief reads as follows:

"As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the Defendant did possess the required intent," (Tr. 14; 10/17/84).

The petitioner finds no difference as between the instruction he challenges and the *instructions* reproduced from *Lakes, ante.*

The instructions in *Lakes* (taken together) and the single instruction as to the present petitioner are, upon analysis, identical.

> that they should not rely on the mandatory presumption to satisfy the state's burden of proof. If the extensive curative language present in *Franklin* was not enough to save the mandatory presumption there from constitutional infirmity, we cannot find virtually the same language, aided only by the clarification added by the italicized language quoted above, sufficient to cure the error in this case," (779 F.2d at 1582).[6]

As to harmless error *vel non* the *Flowers* panel noted that this Court has yet to resolve whether the *harmless error doctrine* is applicable to a *Sandstrom* error . . . 779 F.2d at 1123, n. 9 . . . however, the panel in *Flowers* also points out that the Fifth Circuit has, *sua sponte*, applied the harmless error doctrine . . . 779 F.2d at 1123, n. 9, collecting cases.

In *Lakes v. Ford, ante*, the Eleventh Circuit, while granting relief considered harmless error *vel non* finding that harmless error may exist notwithstanding either a *Sandstrom* or *Franklin* violation . . . 779 F.2d at 1583, 1584. Ultimately the *Lakes* panel found that *Lakes* was entitled to relief notwithstanding the potential for the invocation of the harmless error doctrine (*id.* at 1183, 1184).[7]

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[6] The *Lakes* panel, while granting §2254 relief, cited extensively from *Francis v. Franklin* and a number of Eleventh Circuit cases including *Kemp v. Thomas*, 766 F.2d 452 (CA 11, 1985); Petition for Cert. pending under this Court's docket number 85-736.

[7] *Contra*, see *Logan v. Abshire*, 778 F.2d 283 (CA 6, 1985) (vacating §2254 relief finding that *Sandstrom* error in instruction on presumption of intent was harmless beyond a reasonable doubt).

Thus it is clear, that the Circuits are hardly in accord as to the applicability of the harmless error doctrine in connection with *Sandstrom/Franklin* violations. It should also be noted that the *Logan* decision fails to cite the Court's 1985 *Francis v. Franklin* decision.

II.

CONCLUSION

In *Francis v. Franklin* the Court declined to resolve whether the harmless error doctrine is applicable to a *Sandstrom* error, 105 S.Ct. at 1977. The same might be said for *Connecticut v. Johnson*, 460 U.S. at 86-87, 103 S.Ct. at 977 (1983) (plurality opinion of Blackmun, J.).

Both the opening petition and this supplemental brief point out the multiple present problems within the criminal justice system in connection with the use and abuse of both mandatory and permissive "intent" instructions.

The Fifth Circuit, has found that instructions approved in petitioner's case . . . to be disapproved in other Fifth Circuit decisions (e.g., *United States v. Merkt*, 764 F.2d 266, 272 (CA 5, 1985) and *Flowers v. Blackburn*, 779 F.2d 1115, 1120-1123 (CA 5, 1986)).

Under such circumstances it would seem appropriate that this Court grant plenary review to the petitioner and vacate his conviction and sentence.

Respectfully submitted,

ALLAN A. ACKERMAN, Esq.
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891
Attorney for Petitioner

APPENDIX 1

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 28, 1986

Mr. Allan A. Ackerman
2000 N. Clifton Avenue
Chicago, IL 60614

Re: Richard H. Kimmel
v. United States
No. 85-1223

Dear Mr. Ackerman:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on January 17, 1986 as No. 85-1223.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

by /s/ FRANCIS J. LORSON

Francis J. Lorson
Chief Deputy Clerk

Enclosures

APPENDIX 2

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

February 13, 1986

The Honorable Charles Fried
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Re: Richard H. Kimmel v. United States
No. 85-1223

Dear Mr. Fried

Although your office has waived the right to file a response to the petition for a writ of certiorari in the above case, the Court nevertheless has directed this office to request that a response be filed.

Forty printed copies of your response, together with proof of service thereof, should reach this office on or before March 15, 1986.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

cc: Allan A. Ackerman, Esq.
2000 N. Clifton Avenue
Chicago, Illinois 60614

APPENDIX 3

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530
13 MAR 1986

The Honorable Joseph F. Spaniol
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Richard H. Kimmel* v. *United States*, No. 85-1223

Dear Mr. Spaniol:

The petition for a writ of certiorari in the above case was filed on January 17, 1986. Although the government waived its right to file a response to the petition, the Court has asked that a response be filed. The response is now due on March 14, 1986. We are hereby requesting, under Rule 29.3 of the Rules of the Supreme Court, an extension of time to and including April 13, 1986, within which to file the government's response.

This request for an extension of time is necessary because the attorney who has primary responsibility for preparing the government's response has been busy on other matters before this Court having earlier due dates.

Sincerely,

CHARLES FRIED
Solicitor General

cc: Allan A. Ackerman, Esq.
2000 N. Clifton Avenue
Chicago, Illinois 60614

APPENDIX 4

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

March 14, 1986

Honorable Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: Richard H. Kimmel v. United States
No. 85-1223

Dear Mr. Fried:

Your request of March 13, 1986, for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including April 13, 1986.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Francis J. Lorson
Chief Deputy Clerk

FJL/dee

cc: Allan A. Ackerman, Esquire